3-15-2013

Morgan v. New Sweden Irr. Dist. Appellant's Brief Dckt. 39624

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRADLEY K. MORGAN, Plaintiff - Appellant, v. NEW SWEDEN IRRIGATION DISTRICT, Defendant - Respondent.	)	Supreme Court Docket No. 39624-2012 Bonneville County District Court No. 2010-6464

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho in and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR., DISTRICT JUDGE, PRESIDING

M. Brent Morgan
M. BRENT MORGAN, CHTD.
1106 East Center
Pocatello, Idaho 83201-5202
Telephone: (208) 232-7800
Fax: (208) 232-1900
Attorney for Plaintiff/Appellant

Blake G. Hall
NELSON HALL PARRY TUCKER, P.A.
PO Box 51630
Idaho Falls, ID 83405-1630
Telephone: (208) 522-3001
Fax: (208) 523-7254
Attorney for Defendant/Respondent

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case originated with the original Plaintiffs, Marvin F. Morgan ("Marvin Morgan") and Bradley K. Morgan ("Bradley Morgan"), father and son, filing suit against the Defendant, New Sweden Irrigation District ("New Sweden"), for monetary damages caused to the plants, sprinkling equipment, buildings and/or attached structures, and to the well located on the subject real property, consisting of Lots 6 and 7 in Block 2 of the Canyon Creek Estates which is located in Bonneville County, State of Idaho, and adjacent to highway U.S. 20 and West of the City of Idaho Falls. Each lot includes approximately 2 acres more or less. That property is commonly known as 295 Canyon Creek Road, Idaho Falls, Idaho. There is a canal running along the entire Westerly boundary of that land.

The land was purchased originally by Bradley Morgan and his parents in 1974. At that time, there were wild rose bushes and Russian Olive trees growing along the banks of the canal and an already large Weeping Willow tree near the banks of the canal, almost in the center of the property. Within two months after the purchase, Bradley Morgan constructed a fence completely surrounding the subject property, part of which ran along the top of the canal bank on his side of the canal. There were two large gates permitting access inside of that fence and those two gates were kept locked so that he could keep horses within that fence. Within the fence and close to the canal, Bradley Morgan also placed on the premises a hay shed and a horse manger, a garage and a barn. Between the back of the barn and the canal, Bradley installed a 4 foot wide gate in the fence to permit access to the canal. Those structures were installed with the knowledge and

assistance of the then ditch rider for New Sweden from whom the property was purchased.

Prior to 2007, Bradley Morgan's mother died and his father conveyed the land to him. The fence remained in place until 2007, when Bradley Morgan removed the fence to permit the construction of a home and a large shop/garage to the North of the home. All the rest of the structures still remain on the Northern part of the premises, together with the wild rose bushes, Russian Olive trees and the Weeping Willow tree. Bradley Morgan and his father were residing in the home in June, 2009.

The damages were caused on June 25, 2009, at a time when neither Bradley Morgan, nor his father were present. Kent Ockerman, an employee of New Sweden, entered on Bradley Morgan's land driving a huge, full-sized tractor, trailing a small mower and to which there was attached on the right side a mowing blade that could be extended and retracted hydraulically. The tracks in the dirt showed that Mr. Ockerman backed up along the back of the barn; drove across an existing garden plot, completely destroying it; cut down all of the wild rose bushes and tore up the small Russian Olive trees on top of the canal bank, none of which impeded the flow of water in the canal; turned left at the Weeping Willow tree and drove across the lawn, around the tree and either across or adjacent to the well head back to the canal bank; and, was about half way across the property when Bradley Morgan was alerted by a neighbor, discovered what he was doing and stopped him. In addition to the damage to plants and shrubbery, Bradley Morgan discovered immediately after this incident that the post supporting the stairway at the back of his barn had been snapped off at the base and the entire stairway shoved to the North; and, shortly thereafter, lost water pressure to his lawn sprinkler and to his house and discovered that the well

pipe had been broken at a location about 20 feet below the ground. These damages could only have been caused by impact from some large object and the only large object that had been on the premises between the time when there was no damage and when the damage was discovered was the large tractor mower driven by Mr. Ockerman.

The canal running along the entire westerly boundary of that property is within the legal description of the land owned by Bradley Morgan. However, New Sweden is an irrigation district organized and existing under the laws of the State of Idaho, with its operations located within Bonneville County, and it is undisputed that it possesses a right-of-way along both sides of that canal pursuant to the provisions of Idaho Code § 42-1102 in order to maintain the flow of water in that canal as is reasonable and necessary to transport that water to its shareholders for their use. Although New Sweden has repeatedly referred to itself as the "owner" of the canal, it is undisputed that its easement does not give it legal title to any portion of the land belonging to Bradley Morgan. *See, Reynolds Irrigation District v. Sproat*, 69 Idaho 315, 206 P.2d 774 (1948).

When Bradley Morgan and his father filed suit for damages caused by New Sweden's employee, New Sweden retaliated by counterclaiming and seeking a judgment pursuant to Idaho Code §§ 10-1201 *et. seq.*, declaring that it has the right to an easement at a minimum of 16 feet wide on both sides of the canal; and, that this easement is exclusive, giving New Sweden the unlimited right to damage or destroy anything within the confines of its easement in order to clean, maintain and/or repair the canal to permit the flow of water to its shareholders. New Sweden did not ask that the Court limit the easement to Bradley Morgan's property or define where it started and where it ended, but no other property owners were named as defendants to

this declaratory judgment action.

After pursuing discovery, Bradley Morgan filed a motion with the Court seeking permission to amend the complaint to correctly identify him as the proper Plaintiff, individually, based on his sole ownership of the subject property; and, to obtain a judgment also in accordance with Idaho Code §§ 10-1201 *et. seq.* defining New Sweden's easement by declaring that he is entitled to the reasonable use of his land in order to maintain his sheds, stalls, garage, well and foot bridge and that none of those structures have in the past, nor will they in the future, interfere with the limited right of New Sweden to enter on the subject real property in order to clean, maintain and/or repair the canal crossing his land. New Sweden objected to that portion of this motion to the extent it sought a declaratory judgment on the issue of the easement, asserting that this part of the motion failed to state a valid claim and would be futile. This motion was heard as part of New Sweden's motion for summary judgment.

II. COURSE OF PROCEEDINGS BELOW

New Sweden filed a motion with the Court to resolve the issue of the easement by summary judgment *R. p. 29*, supported solely by the affidavits of Kail Sheppard *R. p. 30A* and Kent Ockerman *R. p. 30G.* In its motion for summary judgment, New Sweden asserted that the facts were undisputed that it maintained 125 miles of canal, including the length of that canal across Bradley Morgan's property, requiring the use of a tractor mower with a 16 foot wide span, such as that used by Mr. Ockerman; to Mr. Sheppard's affidavit as Exhibit A there was attached a photograph of this tractor/mower, a copy of which is attached hereto; that New Sweden had mowed the canal bank on Bradley Morgan's property in the past using this mower; that New

Sweden uses this same equipment everywhere else along the 125 miles of canal that it maintains; that Bradley had installed encroachments within its easement that unreasonably and materially interfere with its exercise of its easement, both alongside and within the canal; that New Sweden had the absolute right in its discretion to damage, destroy or remove any and all encroachments within its easement; and, that the Court should enter a judgment declaring that not only was it entitled to a mandatory 16 foot wide easement along both sides of the canal at this location, but also the removal of ***all*** physical encroachments within that easement ***and*** an absolute injunction against this property owner's restrictions as to the use of that easement. There was no mention in this motion for summary judgment regarding New Sweden's easement anywhere else along the 125 miles of canal it maintains and the property owner on the other side of the canal was not named as a defendant in this action, although the declaratory judgment action clearly affected his rights and interest. The declaratory judgment action was also broad enough to impact the property rights of all property owners along the length of the canals maintained by New Sweden.

Bradley Morgan responded and objected to this motion for summary judgment *R. p. 31*, supported by his affidavit *R. p. 32A* to which there was attached numerous photographs corroborating his factual assertions, and the affidavit of the adjoining property owner on the other side of the canal, Rick Provencher *R. p. 32D* confirming Bradley Morgan's assertions of fact. New Sweden never responded denying any of the factual assertions in the affidavits filed on behalf of Bradley Morgan's response and objection.

On October 25, 2011, a ***Memorandum Decision and Order Re: Motion for Summary Judgment, Motion to Amend & Motion to Strike*** *R. p. 45* was entered by the District Court

granting summary judgment to New Sweden based on the finding of the District Court that the relevant facts were undisputed; that New Sweden was entitled to summary judgment in accordance with its counterclaim for a declaratory judgment construing the scope and extent of its easement; that New Sweden was also entitled to summary judgment dismissing Bradley Morgan's complaint for damages to property within the 16 foot wide easement; denying New Sweden's motion for summary judgment for damages done to property outside the 16 foot wide easement; granting Bradley Morgan's motion to amend in order to remove Marvin Morgan as a plaintiff, but denying his motion to amend to assert a claim for declaratory judgment on the scope and extent of New Sweden's easement.

On November 7, 2011, Bradley Morgan filed a ***Motion to Reconsider & to Alter or Amend Memorandum Decision and Order Re: Motion for Summary Judgment, Motion to Amend & Motion to Strike***, *R. p. 58*, supported by the additional affidavit of Bradley Morgan. *R. p. 64A* to which there were attached several photographs showing the land of other property owners, including the land of the President of the Board of Directors for New Sweden, on which there were obvious encroachments within 16 feet of the banks of the canal and emphasizing that no action had been brought by New Sweden against these property owners for encroachment on or interference with its easement.

New Sweden filed its ***Memorandum in Opposition to Plaintiff's Motion for Reconsideration*** on November 17, 2011, and motion to strike the additional affidavit of Bradley Morgan, *R. p. 65*; and, Bradley Morgan responded with his ***Supplemental Memorandum*** on November 23, 2011. The District Court then entered its ***Memorandum Decision Re: Motion to***

Reconsider on December 21, 2011, denying the Bradley Morgan's motion to reconsider based on the District Court's assertion that it has broad discretion over the admission of evidence and in granting or denying relief pursuant to a motion to reconsider; and, relying essentially on the same findings of fact and conclusions of law as relied upon in its original memorandum decision and order. *R. p. 76.*

Bradley filed his original ***Notice of Appeal*** on January 26, 2012, *R. p. 83,* but this matter then went to trial on April 10, 2012, only on the issue of damages caused by New Sweden outside the scope of its easement. On June 11, 2012, the District Court entered its ***Findings of Fact and Conclusions of Law***, finding and concluding that New Sweden owed Bradley Morgan a duty of due care when it entered on his property outside of its easement, but did not breach that duty; that the doctrine of *res ipsa loquitur* did not apply in this case; that in applying the doctrine of comparative negligence, Bradley Morgan was at least as negligent as New Sweden by causing or permitting encroachments within New Sweden's easement that caused it to go outside of that easement and cross other areas of Bradley Morgan's property; and, based on these findings and conclusions, awarding no damages based on negligence. *R. p. 92.*

Judgment was entered on August 16, 2012, R. *p. 106*, as follows:

1. Declaring that New Sweden owns a right-of-way along the Sinkhole irrigation canal that runs the length of Bradley Morgan's western boundary; and, that said right-of-way is 16 feet wide ***on each side of the irrigation canal*** based upon the type of equipment that is commonly used to clean, maintain, or repair the irrigation canal. (***Emphasis added.***)

2. Declaring that New Sweden is entitled, pursuant to statute, to clean, maintain and repair the irrigation canal, including the banks of the canal; and, that said cleaning, maintenance and repair includes the right to remove vegetation and trees growing along and within the right-of-way.

3. Declaring that any and all encroachments located within the 16 foot wide right-of-way, including but not limited to all outbuildings (horse manger and garage), sprinkler equipment, trees, and a garden plot, must be removed; and, that Bradley Morgan is enjoined from taking any action that unreasonably interferes with New Sweden's right to operate their equipment within that right-of-way.

4. That New Sweden did not breach any duty of reasonable care in the maintenance of the right-of-way; and, that there was insufficient evidence to establish that damage, if any, sustained to Bradley Morgan's vegetation, stairway, and well head was caused by New Sweden.

5. That New Sweden is the prevailing party and is awarded costs as a matter of right in the amount of $1,038.10.

New Sweden's motion for attorneys fees was denied.

Bradley Morgan filed his ***Amended Notice of Appeal*** from this ***Judgment*** on August 22, 2012.

III. STATEMENT OF THE RELEVANT FACTS

The facts which are relevant to the District Court's granting of summary judgment to New Sweden on its counterclaim for a declaratory judgment construing the scope and extent of its easement in this case must be distinguished from the facts which are relevant to the District

Court's findings of fact as a basis for the judgment denying Bradley's claim for damages based on New Sweden's negligence.

A. Statement of Relevant Facts on Summary Judgment

The motion for summary judgment that was filed on behalf of New Sweden relied entirely on the alleged facts as set forth in the affidavits of Kail Sheppard *R. p. 30A* and Kent Ockerman *R. p. 30G*, which asserted as undisputed that:

1. New Sweden owns and maintains 125 miles of canal, including the length of that canal across Bradley Morgan's property. *R. p. 30B.*

2. That the type of equipment required to maintain, clean and repair the canals included a tractor that trails a mower and has a side mower on the right side that can be raised and lowered hydraulically; and, that 16 feet of flat surface was absolutely required to properly maintain the canals with this mower. It was implied that this mower had in the past been used along the entire 125 miles of canal and, in particular, on Bradley Morgan's property; but, there was no factual reference to when this mower had ever been used on Bradley's property, except for the incident on June 25, 2009. That mower was identified in Exhibit A to the affidavit of Mr. Sheppard. *R. pp. 30B-C; R. p. 30H.* Mr. Ockerman testified at trial, in fact, that he had never been on this land with that mower prior to that date and had only been on the land to spray weeds. *T. pp. 229-230.*

3. That the type of equipment required to maintain, clean and repair the canals also included a large excavator for canal cleaning and debris removal, which also required 16 feet exclusive of any sloping banks. *R. p. 30C.* There was absolutely no factual reference to any time when this excavator had ever been used anywhere along the 125 miles of canal and, in particular,

that it had ever been used in or along the canal across Bradley Morgan's property.

4. The factual and legal conclusions that Bradley Morgan had installed encroachments within New Sweden's easement that unreasonably and materially interfered with its exercise of its easement; and, that New Sweden had the absolute right in its discretion to damage, destroy or remove any and all encroachments within its easement. *R. p. 30D.*

Contrary to those facts as alleged by New Sweden, the affidavits on behalf of Bradley Morgan asserted the following facts:

1. Bradley Morgan and his parents, Marvin F. Morgan and Ella Morgan, first purchased the subject real property on or about September 3, 1974. All right, title and interest in and to the subject property has since been conveyed by Marvin F. Morgan, individually and as personal representative of the estate of Ella Morgan, to Bradley K. Morgan. *R. pp. 32A-B.*

2. At that time of that purchase, there were wild rose bushes and Russian Olive trees growing along the banks of the canal and an already large Weeping Willow tree near the banks of the canal, almost in the center of the property. Within or about two months after the purchase of the property in 1974, Bradley Morgan constructed a fence completely surrounding the subject property, part of which ran along the top of the canal bank on his side of the canal. There were two large gates permitting access inside of that fence and those two gates were kept locked so that Bradley Morgan could keep horses within that fence. As a result of this fence and the locked gates, it was physically impossible for New Sweden to have mowed along the ditch bank using a mower with a 16 foot wide span, which it claimed in this action was necessary to clean and maintain the canal banks. *R. p. 32B.*

3. Shortly after the fence was constructed in 1974, Bradley Morgan placed on the premises a hay shed and a horse manger, a garage and a barn. Between the end of the barn and the canal, Bradley installed a 4 foot wide gate to permit access to the canal. Those structures still remain to date. *R. p. 32B.*

4. Bradley Morgan is, and has been since 1974, a shareholder in New Sweden Irrigation District and has rights to water from the canal adjacent to his real property, which was serviced by a ditch that ran along the East side of the canal and the length of his real property. However, at the time that Canyon Creek Estates was developed, the Canyon Creek Road was built and the developers failed to run a culvert underneath that road, which shut off of the supply of water to that ditch and prevented Bradley Morgan from having water from the canal to irrigate his real property. As a result, at the same time that he built the above-referenced fence, he also had a well installed, both to irrigate his land and for fire protection. Bradley Morgan irrigates his entire parcel of real property using a 2 inch sprinkler pipe and water pumped from the well. The sprinkler pipe runs the entire length of the land from the well all the way to the Southern end of the land adjacent to U.S. 20 highway. Bradley Morgan continues to irrigate using that sprinkler pipe. *R. p. 32B.*

5. The wild rose bushes, sage brush plants and Russian Olive trees and Weeping Willow tree remained the entire time that Bradley Morgan has owned the land and up to the time that the employee of New Sweden mowed down or otherwise destroyed some of those plants and trees. *R. p. 32C.*

6. During the entire time that Bradley Morgan owned the land fro 1974 and up until June 25, 2009, he was the only person who had mowed the land along the side of the canal on his property and he was the only person who had removed the grass and weeds inside of that canal, which he did by burning those weeds in the Spring of each year. The only exception was when New Sweden contacted Bradley Morgan and requested to remove some Russian Olive trees that had started to grow down in the canal. Bradley Morgan agreed to and helped in the removal of those trees. There was no maintenance attempted by New Sweden along this section of this canal using equipment of the type used by Mr. Ocherman until June 25, 2009. *R. pp. 32C-D.*

7. Approximately 5 years after Bradley Morgan and his parents purchased his land, Art McDonald purchased the land on the West side of the canal bank across from Bradley Morgan's property and Art McDonald also installed a fence on that side of the canal that was within 16 feet of the banks of the canal. During the time that Art McDonald owned that property, he kept his side of the canal in a natural state, neither mowing the grass, nor burning the weeds down into the canal. Art McDonald sold his land in approximately 1999 and Rick Provencher purchased that land in approximately 2002. During the time that Rick Provencher has owned the land on that side of the canal and up to June 25, 2009, it was Rick Provencher who mowed the land between his fence and the canal. New Sweden never attempted any maintenance on the West side of the canal using equipment of the type used by Mr. Ocherman until June 25, 2009, when the New Sweden employee used the same tractor mower to cut down the sage brush along the Provencher fence. The sage brush was neither impeding the flow of water, nor restricting access to the canal. There was no grass to mow on that date, because it had already been mowed by

Rick Provencher. *R. p. 32C.*

8. The facts as asserted by Bradley Morgan are all corroborated by photographs attached to his affidavit. *R. pp. 32I-CC.*

The facts as alleged by Bradley Morgan in response and objection to the motion for summary judgment clearly dispute and contradict the facts as alleged by New Sweden in its supporting affidavits on summary judgment.

B. Statement of Relevant Facts at Trial on Issue of Negligence

It is undisputed that Mr. Ockerman was the only person present at the time he drove the huge tractor/mower onto the property owned by Bradley Morgan and drove across the garden plot in the process of chopping down some small Russian Olive trees and the wild rose bushes and then driving across the already mowed lawn next to Bradley's house and then onto the lawn in order to circumvent the large Weeping Willow tree and taking him directly next to the well head in order to get back to the banks of the canal. Mr. Ockerman obviously took the stand and testified that he never hit the stairway post or the well head or broke off any sprinkler heads.

Nevertheless, the evidence was undisputed that the stairway was not damaged on the day prior to Mr. Ockerman backing up his tractor/mower next to it *T. p. 375-376* and the cost to repair those damages was established with reasonable certainty. Bradley Morgan and his father had normal water pressure to the home and lawn sprinklers on the day prior to Mr. Ockerman driving the huge tractor/mower next to the well head and the next day when they operated the sprinkler and attempted to take a shower, there was no water pressure and no water and there were broken sprinkler heads lying on the ground. *T. pp. 342-343, p. 357-358.* It was undisputed

that the well pipe was discovered to be broken at a joint approximately 20 feet below the surface and that the break was unrusted, indicating a recent and traumatic break. *T. p. 354.* The testimony that the break to the pipe had caused the destruction of the electrical system that operated the well was undisputed. *T. p. 362, p. 366.* The cost to repair those damages was undisputed and established with reasonable certainty. It was undisputed that there was no piece of equipment, no object and no person on the property on the day prior to June 25, 2009, to the day after June 25, 2009, that could have caused the damage to the subject property; and, it was undisputed that the only person on the property with a piece of equipment that could have caused the damage on June 25, 2009, was Mr. Ockerman. *T. p. 383.* Bradley Morgan had requested leave of the Court to offer the testimony of the person who had installed and who repaired the well on the issue of causation, but that request was denied. The District Court excluded all evidence as to any damages to property within the area it had determined to be New Sweden's easement.

ISSUES ON APPEAL

The Plaintiff, as Appellant, submits the following issues to be considered on appeal:

1. Whether the District Court erred in misapplying the principles and law governing summary judgment in this case?

2. Whether the District Court erred in applying the law under Idaho Code (I.C.) § 42-1102 and § 42-1209 in declaring the scope and extent of New Sweden's easement; ordering that the property owner must remove all encroachments within that easement; and, declaring that New Sweden had the absolute right to remove, damage or destroy any property within its easement at its discretion.

3. Whether the District Court erred by granting summary judgment to Defendant New Sweden where the facts, if undisputed, established that the property owner's continued use of his

land in the manner in which it had been used for over 35 years was not inconsistent with, nor did such use materially interfere with, the use of the easement by Defendant New Sweden.

4. Whether the District Court erred in defining the easement awarded to Defendant New Sweden by failing to expressly define the exact location, width, and length of the easement and the exact point of access by Defendant New Sweden across the property owner's land.

5. Whether the District Court erred in determining that the property owner has absolutely and unequivocally no recourse against Defendant New Sweden for its destruction or damage of anything inside of its easement.

6. Whether the District Court erred in granting summary judgment to Defendant New Sweden by declaring the scope and extent of its easement along both banks of the canal without limit and where all property owners along the canal were indispensable parties and were not named in Defendant's counterclaim?

7. Whether the decision of the District Court in granting summary judgment to Defendant New Sweden is in this case an abuse of discretion.

8. Whether the District Court erred in awarding judgment to Defendant New Sweden based on a finding and conclusion that Defendant New Sweden did not breach any duty of reasonable care in the maintenance of the right-of-way.

9. Whether the District Court erred in awarding judgment to Defendant New Sweden based on a finding and conclusion that there was insufficient evidence to establish that the damage sustained to the Plaintiff's vegetation, stairway and wellhead was caused by Defendant New Sweden.

10. Whether the District Court erred in awarding costs to Defendant New Sweden as the prevailing party in this matter.

11. Whether the Appellant is entitled to an award of costs and attorneys fees on appeal pursuant to Idaho Code § 12-121.

ARGUMENT

I. MISAPPLICATION OF THE SUMMARY JUDGMENT STANDARD

A. The Summary Judgment Standard.

New Sweden in this case filed for summary judgment on its counterclaim for declaratory

judgment defining the scope and extent of its easement and dismissing or limiting Bradley Morgan's claim for damages based on negligence pursuant to the provisions of Rule 56 of the Idaho Rules of Civil Procedure which provides in pertinent part:

> " . . . the judgment sought shall be rendered forthwith if the pleadings, deposition and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. . . Such judgment, when appropriate, may be rendered for or against any party to the action. . ."

The unique aspect of this particular motion for summary judgment is that it is for a declaratory judgment construing the scope and extent of New Sweden's statutory right-of-way in order to maintain, clean and repair the particular section of canal that crosses the land owned by Bradley Morgan. That declaratory judgment action sought to establish the scope and extent of that easement along both sides of the canal, but did not name any other property owner, including, but not limited to, the owner of the property on the other side of the canal, as a defendant in its counterclaim.

Regardless, the basic principles of law on summary judgment still apply i.e. upon a motion for summary judgment, both the district court and the Supreme Court upon review, ***must*** liberally construe all disputed facts in favor of the non-moving party. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960 (1994); *citing Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 867 (1991). (***Emphasis added.***) All reasonable inferences that can be made from the record ***shall*** be made in favor of the party opposing the motion. *Id.* (***Emphasis added.***) The burden of proving the absence of a material fact rests ***at all times*** upon the moving party. *Tingley v. Harrison, supra., citing G & M Farms v. Funk Irrigation Company*, 119 Idaho 514, 517, 808 P.2d 851

(1991). (***Emphasis added.***)

B. The District Court erred in applying the Summary Judgment Standard.

Bradley Morgan respectfully submits that the District Court in this case misapplied the summary judgment standard as it weighed the evidence against him and accepted as undisputed the facts as alleged by New Sweden, ignoring completely the facts as set forth in his opposing affidavits and the photographs attached to those affidavits in corroboration of those facts.

It is well-established that on summary judgment, a trial court is not allowed to weigh the evidence:

> The trial court, when confronted by a motion for summary judgment, must determine if there are factual issues which should be resolved by the trier of facts. ***On such a motion it is not the function of the trial court to weigh the evidence or to determine those issues.*** Moreover, all doubts must be resolved against the party moving for a summary judgment. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 414, 353 P.2d 657, 659 (1960) (***Emphasis added.***) *See also, American Land Title Co v Isaak*, 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983) ("A trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues."); *Idaho State University v. Mitchell*, 97 Idaho 724, 730, 552 P.2d 776, 782 (1976)(citing, *Merrill, supra*); *Meyers v. Lott*, 133 Idaho 846, 849, 993P.2d 609, 612 (2000). (***Emphasis added.***)

A trier of fact may not arbitrarily disregard credible and unimpeached testimony of a witness. *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998), *citing Dinneen v. Finch,* 100 Idaho 620, 627-28, 603 P.2d 575, 582-83 (1979). In a related vein, it has long been recognized that unless a witness's testimony is inherently improbable, or rendered so by facts and circumstances disclosed at trial, the trier of fact must accept as true the positive, uncontradicted testimony of a credible witness. *Wood v. Hoglund, Id., citing Pierstorff v. Gray's Auto Shop, et al.,* 58 Idaho 438, 447, 74 P.2d 171, 175 (1937).

In this case, the factual evidence set forth in the affidavits filed on behalf of Bradley Morgan directly disputed and contradicted the facts as alleged by New Sweden. Likewise, missing from the record is a finding by the District Court that the affidavit testimony of Bradley K. Morgan and Rick Provencher was not credible.

In this case, the District Court acknowledged, but ignored, the difference in facts as argued by both parties, as follows:

First, New Sweden asserted that it had mowed the canal bank on Bradley Morgan's property prior to June 25, 2009, using equipment of the type used by Mr. Ocherman. Bradley Morgan provided photographs confirming that it was physically and practically impossible for New Sweden to have mowed the canal bank as it claimed, because until 2007 the property was enclosed completely by a fence that prevented the use of the type of equipment suggested by New Sweden. That is a question of fact that should have been resolved in favor of Bradley Morgan, but was not; and, if construed in favor of Bradley Morgan confirmed that the tractor/mower used by New Sweden on June 25, 2009, was not necessary in order to properly clean, maintain and/or repair the canal at that location. Note that at the trial, Mr. Ockerman when questioned regarding this issue admitted he had not mowed this land using the subject tractor/mower. Had this matter gone to trial, this issue should have been resolved in favor of Bradley Morgan.

Second, the undisputed testimony was that the wild rose bushes, sage brush plants and Russian Olive trees along the ditch bank, the large weeping willow tree, the barn, horse manger, and sheds on Bradley's property have been there for over 35 years without interfering with New Sweden's easement or with New Sweden's maintaining, cleaning or repair of the canal at this

location. That is a question of fact that should have been resolved in favor of Bradley Morgan and the law under I.C. § 42-1102 and § 42-1209 should have been applied based on those facts, but was not; and, if construed in favor of Bradley Morgan these facts confirmed that as a matter of law the permission of New Sweden for those encroachments was not required and none of these objects ***unreasonably or materially interfered with the use and enjoyment of the right-of-way by New Sweden*** during that 35+ year period of time.

Third, New Sweden asserted that it uses this same equipment ***everywhere else*** along the 125 miles of canal that it maintains. All you have to do is examine the photographs provided by Bradley Morgan and you can determine that just across the canal on the opposite bank there are two 60+ foot tall pine trees directly next to the canal. Obviously, New Sweden does not have to, nor does it, use this same equipment everywhere else along the 125 miles of canal that it maintains. That is a question of fact that should have been resolved in favor of Bradley Morgan and the law under I.C. § 42-1102 and § 42-1209 should have been applied based on those facts, but was not; and, if construed in favor of Bradley Morgan confirmed that New Sweden was able to properly clean, maintain and repair section of the canal without the use of such equipment; and, as a corollary, a 16 foot wide easement was ***not*** mandatory. Again, it was also admitted by Mr. Ockerman at trial that prior to this date the land had never been cleaned or maintained using this mower.

The District Court erred in misapplying the principles and law governing summary judgment in this case.

II. ERRORS IN CONSTRUING THE SCOPE AND EXTENT OF NEW SWEDEN'S EASEMENT

A. The Easement established by Idaho Code §§ 42-1102 and/or 42-1209

It is conceded that Chapter 11 and 12 of Title 42 of the Idaho Code provide the statutory basis for a right-of-way that may be claimed in order to maintain, clean or repair a canal that crosses the land of another.

Idaho Code § 42-1102 expressly provides as follows:

> **42-1102. Owners of land – Right to right-of-way.**–When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation. The right-of-way shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit ***as is necessary to properly do the work of cleaning, maintaining and repairing*** the ditch, canal or conduit with personnel and with equipment as is commonly used, or is reasonably adapted to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but ***no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits*** shall be occupied by the removed debris or other matter. Provided, that in the making, constructing, keeping up and maintenance of such ditch, canal or conduit, through the lands of others, the person, company or corporation, proceeding under this section, and those succeeding to the interests of such person, company or corporation, must keep such ditch, canal or other conduit in good repair, and ***are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident*** (unless the same be unavoidable) to such ditch or aqueduct.
>
> The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.
>
> Rights-of-way provided by this section are essential for the operations of the ditches, canals and conduits. No person or entity shall cause or permit any

encroachments onto the right-of-way, including public or private roads, utilities, fences, gates, pipelines, structures or other construction or placement of objects, without the written permission of the owner of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way. Encroachments of any kind placed in such right-of-way without such express written permission of the owner of the right-of-way shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the owner of the right-of-way, ***in the even that any such encroachments unreasonably or materially interfere with the use and enjoyment of the right-of-way.*** Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code.

This section shall apply to ditches, canals or other conduits existing on the effective date [March 12, 1996] of this act, as well as to ditches, canals or other conduits constructed after such effective date. (***Emphasis added.***)

Idaho Code § 42-1209 expressly provides as follows:

42-1209. Encroachments on easements and rights-of-way.– Easements or rights-of-way of irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities. Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit irrigation entity, lateral ditch association or drainage district owing the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Encroachments of any kind placed in such easement or right-of-way, without such express written permission shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the owner of the easement or right-of-way, ***in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way***. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code. (***Emphasis added.***)

These were the two statutes which New Sweden asked the District Court to apply in determining the scope and extent of its right-of-way. Note that the effective date of I.C. § 42-1102 is March 12, 1996, and that the requirement within this statute for the express written

permission of the owner of the right-of-way was not added until July 1, 2004. Note that I.C. § 42-1209 was not effective until July 1, 2004.

B. Declaratory Judgment Provisions

Idaho Code §§ 10-1201 *et. seq.* provides for declaratory judgments and § 10-1202 expressly provides that any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. When the District Court concluded in its ***Memorandum Decision and Order Re: Motion for Summary Judgment, Motion to Amend & Motion to Strike*** *R. p. 45, 55* that Bradley Morgan's motion to add a claim for declaratory relief was without merit and would be futile, that conclusion was clearly wrong.

Bradley Morgan's motion for leave to amend to add a claim for declaratory judgment would have compelled the District Court to address the following issues and it was error on the part of the District Court to not have addressed these issues:

1. What width of land along the banks of the canal adjacent to the Plaintiff's land is ***reasonably necessary*** to properly do the work of cleaning, maintaining and repairing the canal pursuant to the provisions of Idaho Code §§ 42-1102 and/or 42-1209?

2. Whether the easement claimed by the Defendant is ***exclusive***, precluding the Plaintiff from the reasonable use and enjoyment of the land within that easement; and, if not exclusive, then do the structures, plants and trees owned by the Plaintiff and within that easement ***unreasonably and/or materially interfere*** with

the Defendant's enjoyment of that easement?

3. Whether the Defendant in the enjoyment of its easement ***unreasonably and unnecessarily caused damage*** to the Plaintiff's property, including, but not limited to, his plants, sprinkling equipment, buildings and/or attached structures in violation of the restrictions of Idaho Code §§ 42-1102 and/or 42-1209?

The District Court erred by now allowing Bradley Morgan to file in amended complaint and permit these issues to have been addressed.

C. Error in Construing the Width of the Easement

The District Court in its memorandum decision has summarily concluded that the scope of the easement created under Idaho Code (I.C.) § 42-1102 in this case is 16 feet wide by concluding that the tractor/mower with a 16 foot wide span is "necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit. . ." along this section of the canals even though that fact was disputed. In fact, if the District Court's decision is upheld, it dictates that a 16 foot wide easement is mandatory along the entire 125 miles of canal maintained by New Sweden.

Bradley Morgan respectfully submits that this Court's holding in *Nampa & Meridian Irrigation Dist. v. Washington Fed. Sav.,* 135 Idaho 518, 20 P.3d 702 (2001) establishes that the width of the easement is determined ***first*** by what is reasonable and necessary; and, only ***second***, by the personnel and/or equipment then necessary for that work i.e. if there is a section of land along the canal that is bare ground or which has already been mowed by the land owner, then a 16 foot wide easement along that section to permit access by a mower 16 feet wide is neither reasonable, nor necessary. *Nampa & Meridian Irrigation Dist., supra*, emphatically establishes

that (1) the owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate; and, that the burden of showing obstruction with the use of the easement is on the easement owner, not the servient estate. *Id.* at pp. 521-522. Further, this Court noted that while evidence of past use does not necessarily mean that the owner of the easement will never employ heavy equipment to clear or repair the lateral (canal), it does suggest that the easement owner's activity will be so infrequent that its easement rights will not be unreasonably interfered with. *Id.* at p. 523. That rationale applies in this case.

In this case and along this particular section of the canal, Bradley Morgan has established that for the prior 35+ years the use of a 16 foot wide mower was not necessary. New Sweden produced no evidence disputing that it was able to maintain this section of canal in the past without such equipment, but in response to a claim for damages now claims that such use is both "reasonable and necessary."

The District Court's determination that a 16 foot wide easement is reasonable and appropriate, because "the fact that New Sweden may not have done so in the recent past does not preclude it from asserting its rights when the need arises" is inconsistent with the Idaho Supreme Court's decision in *Nampa & Meridian Irrigation Dist., supra.* The scope of the easement is limited to what is reasonable and necessary ***at this point in time***, not what may be reasonable and necessary ***in the future.***

If the District Court's ruling is correct, then the District Court will have mandated that property owners along the entire 125 miles of canals maintained by New Sweden must clear the

land within 16 feet of the canal, or have anything and everything within that distance removed, damaged or destroyed at the whim of New Sweden, whether it has or ever will exercise that easement.

Although the owner of an easement has the right to enter the servient estate in order to maintain, repair, or protect the easement, the easement owner may do so only when necessary and in a reasonable manner as not to increase needlessly the burden on the servient estate. Clearly, the scope of the easement asked for and granted in this case is contrary to the facts and is overly broad in its description. In fact, Idaho's Supreme Court in *Bedke v. Pickett Ranch and Sheep Co.*, 143 Idaho 36, 137 P.3d 423, 427 (Idaho 2006) makes it clear that even though there is an easement, that does not mean that it must be exercised, which is the argument made by Bradley Morgan in this case.

D. Error in Describing the Scope of the Easement.

A judgment determining the existence of an easement across the land of another must set forth the location, width, and length of the easement. *Bedke v. Pickett Ranch and Sheep Co., Id.* In this case, the District Court in its memorandum decision has indicated a 16 foot wide easement, but has not explained ***where*** the easement of New Sweden starts and ***where*** it ends i.e. does it start at the water line, on top of the bank or next to the bank? Depending on where the easement starts, the scope of the easement could be more than 20 feet wide. New Sweden has asked for, and the District Court has apparently granted, an injunction preventing the property owner from interfering with New Sweden's "access to its easement." Does that mean that New Sweden can cross the property owner's land ***at any place and every place*** along the canal bank?

If so, that could be construed to mean that the property owner would have to remove his home so that New Sweden could drive across that section of land!

The District Court erred by not specifically and expressly defining the location, width and length of the easement in this case.

E. Error in Ordering Removal of Encroachments.

The District Court reached its decision that New Sweden can mandate the removal of all encroachments within its right-of-way based on three conclusions i.e. first, that I.C. § 42-1102 and § 42-1209 required the property owner in this case to have express written permission from New Sweden for any encroachments; second, that it was undisputed that the encroachments in this case unreasonably and materially interfered with New Sweden's use and enjoyment of its right-of-way; and, regardless, New Sweden had the exclusive right to the use and enjoyment of the land within its easement.

Bradley Morgan in his response to the motion for summary judgment urged the Court to adopt the application of Idaho Code § 42-1102 as set forth by Idaho's Supreme Court in *Nampa & Meridian Irrigation Dist., supra at p. 522* holding and emphasizing that the law is well settled with respect to the correlative rights of dominant and servient owners of easements. The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate. *Citing, Boydstun Beach Ass'n* 111 Idaho at 377, 723 P.2d at 921 (Ct. App. 1986.) In other words, the servient estate owner is entitled to make uses of the property that do not unreasonably interfere with the dominant estate owner's enjoyment of the easement. *Citing, Carson v. Elliott,*

111 Idaho 889, 890, 728 P.2d 778, 779 (Ct. App.1986). It is interesting that in *Nampa & Meridian Irrigation* the irrigation district produced no records or evidence of any maintenance or repairs over a period of 20+ years that would require the use of backhoes, caterpillars, or other heavy equipment; and, in contrast, Washington Federal produced evidence that the only maintenance performed consisted of burning weeds along the canal bank. Those are the same facts that were before the District Court in this case i.e. the facts, if undisputed on summary judgment, confirmed that New Sweden had never prior to June 25, 2009, entered on this property with the huge tractor/mower as claimed in its affidavits. Further, Idaho's Supreme Court noted that while past use does not necessarily mean that the irrigation district will never employ heavy equipment to clean or repair the canal, it does suggest that the irrigation district's activity will be so infrequent that its easement rights will not be unreasonably interfered with. *Nampa & Meridian Irrigation Dist., supra at p. 523.*

Perhaps the best analysis of the application of I.C. § 42-1102 and § 42-1209 is now set forth in *Pioneer Irrigation District v. City of Caldwell,* 153 Idaho 593, 288 P.3d *810* (2012) which is not factually directly on point, because it addresses encroachments that were placed on the property after the enactment of the applicable sections of these statutes after 2004 and were, therefore, subject to the requirement of express written permission from the owner of the easement; however, in this case Idaho's Supreme Court makes it clear that the District Court in this case erred by basing its decision, in part, on the finding that Bradley Morgan did not have the written permission of New Sweden. Since all of the subject encroachments were placed on the property during or about 1974, that requirement under these statutes did not apply as a matter of

law.

Directly on point, in *Pioneer Irrigation District v. City of Caldwell, supra at p. 599*, it was held that four conditions must be satisfied before an encroachment "shall" be removed. First, the encroachment must have been constructed after the effective date of I.C. § 42-1209, as the statute's provision for " such express written permission," which clearly references preceding language in the statute, was not a requirement prior to that date. Second, the encroachment must have been constructed without permission. *Id.* Third, the encroachment must unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. *Id.* Fourth, the ditch owner must request that the party responsible for the encroachment remove it. *Id.* The District Court erred in ordering that it was mandatory that the encroachments placed on the property by Bradley Morgan ***must*** be removed based on him not having the written permission of New Sweden, because they were placed there prior to the effective date of this requirement under I.C. § 42-1102 and § 42-1209; and, regardless, the facts, if undisputed, clearly established that for 35+ years the encroachments had never unreasonably or materially interfered with New Sweden's use and enjoyment of the easement or right-of-way.

Further in *Pioneer Irrigation District v. City of Caldwell*, Idaho's Supreme Court again upheld the decision in *Nampa & Meridian Irrigation Dist. V. Washington Fed. Sav.* That emphatically established that (1) the easement claimed by a canal company is ***not*** exclusive; and, (2) the burden of establishing unreasonable interference is on the owner of the easement, not the owner of the servient estate. In this case, New Sweden has demanded, as the District Court noted, not only a mandatory 16 foot wide easement, but also the removal of ***all*** physical

encroachments on the easement ***and*** an absolute injunction against this property owner's restrictions as to the use of that easement. The District Court erroneously granted summary judgment on all of those issues without requiring that New Sweden carry the burden of proving that such encroachments unreasonably or materially interfere with its use and enjoyment of that easement, which is overly broad and contrary to the prior decisions of Idaho's Supreme Court.

Further, New Sweden asserts that it is ***absolutely and unequivocally*** entitled to the destruction or damage of anything inside of its easement. If that is the case, why was the canal company not entitled to the removal of the sidewalk and fence inside its easement in *Nampa & Meridian Irrigation Dist., supra*? The reason is because Idaho's Supreme Court has made it clear that the burden is on the owner of the easement to establish unreasonable interference, not on the property owner to prove his encroachments do not unreasonably interfere with the use of the easement. Otherwise, the Court opens the door to both discrimination and harassment at the whim of the canal company, which is exactly what is happening in this case; and, if the decision of the District Court stands, that absolute and unequivocal right to the destruction and damage of property within this easement can be used by New Sweden against property owners along the entire 125 mile length of the canals it maintains. That rationale was further asserted by Idaho's Supreme Court in *Bratton v. Scott*, 150 Idaho 530, 538, 248 P.3d 1265 (2011) in which it was determined that the trial court's interpretation of I.C. § 42-1102 caused it to improperly exclude the plaintiffs' evidence regarding damages, resulting in an abuse of discretion. New Sweden is not absolutely and unequivocally entitled to the destruction or damage of anything inside of its easement and Bradley Morgan not only should not be required to remove any encroachments, he

should be entitled to seek damages for the destruction of property not only outside of the easement, but also inside of the easement.

F. Conclusion on Summary Judgment

The ***Judgment*** that was summarily entered by the District Court declaring that New Sweden possesses a right-of-way that is 16 foot wide along the irrigation canal that runs the length of the westerly boundary of Bradley Morgan's property and on both sides of the canal is clearly in error and is based on a finding that an easement this wide is mandated by the type of equipment that is commonly used to clean, maintain or repair the canal at this location, which is contrary to the facts construed in favor of the non-moving party. The decision of the District Court that the exercise of this easement gives New Sweden the absolute and unequivocal right to remove, destroy or damage anything located within that easement without recourse to the property owner is contrary to the law as established by Idaho's Supreme Court. Contrary to the decision of the District Court, there is nothing in Idaho Code § 42-1102 which declares as a matter of law that New Sweden is entitled to an easement 16 foot wide, nor is there anything in that statute which precluded Bradley Morgan from erecting in 1974 any of the structures in question, to include, but not be limited to, the fence along the top of the ditch bank. If the facts are undisputed, those facts confirm that for a period of 35+ years, those structures have ***not*** "unreasonably, nor materially" prevented the cleaning, maintaining and/or repair of the canal at this location. Those facts also confirm that it is possible to mow the banks of the canal without the use of a 16 foot wide mower; and, those facts confirm that it is possible to mow the banks and clean and remove weeds down into the canal without having caused damage to Bradley

Morgan's property.

If summary judgment on the issue of the easement is to be granted, it should be granted declaring that New Sweden does possess a statutory easement, but that there is no basis for the exercise of that easement at this location using the heavy equipment suggested as long as Bradley Morgan, the property owner, is properly cleaning and maintaining the canal bank at no cost or expense to New Sweden; and, that it is clear both on the basis of the clear language of the statutes and the undisputed facts of this case that the easement claimed by New Sweden is not exclusive and that Bradley Morgan's structures do not unreasonably or materially interfere with the proper cleaning, maintaining and/or repair of the canal that crosses his property and there is no basis for declaring that he must remove them.

III. ERRORS IN FINDING AND CONCLUDING THAT NEW SWEDEN DID NOT BREACH A DUTY OF DUE CARE

Based on the fact that no one was present to observe Mr. Ockerman while he was operating the tractor mower on June 25, 2009, Bradley Morgan in his cause of action for negligence urged the application of the doctrine of *res ipsa loquitur* in this case as to damages caused to his stairway and to the well pipe and resulting damage to the well's electrical system.

The District Court in its ***Findings of Fact and Conclusions of Law*** *R. p. 92 at 100* discussed the elements of the doctrine of *res ipsa loquitur*, citing *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 566, 272 P. 3d 534, 538 (2012) and properly concluded that there are two elements that must exist before *res ipsa loquitur* applies in a particular case i.e. (1) the agency or instrumentality causing the injury must be under the exclusive control and management of the

defendant, and (2) the circumstances must be such that common knowledge and experience would justify the inference that the accident would not have happened in the absence of negligence. The District Court also properly recognized that application of the doctrine is limited to those cases which are within the common knowledge and experience of the average layperson.

The District Court had already determined that there was a duty of care owed by New Sweden to Bradley Morgan not to damage his property outside the scope of its easement. Both the stairway and the well head were outside the scope of the 16 foot wide easement in this case. However, in applying the doctrine, the District Court concluded that the evidence must show that not only the "agency or instrumentality" causing the injury was under the exclusive control and management of the defendant, but also that the property on which the damage was done was under the exclusive control of the defendant. That conclusion on the part of the District Court goes beyond the required elements of this doctrine. What was established in this case was that neither the stairway or the well pipe was damaged immediately ***prior to*** New Sweden's employee driving this huge tractor mower next to where the stairway was located and next to where the well pipe was located; that immediately ***after*** the employee having driven the tractor mower next to the stairway, the support post was snapped off at its base and the well pipe was broken at a joint 25 feet below the surface; and, common knowledge and experience would clearly establish that a 4x4 support post does not snap off on its own, nor does a well pipe suddenly break below the surface without something having struck the pipe where it was exposed above the surface. There was no evidence of any other instrumentality sufficient to have caused this type of damage being on the property in that time frame other than the tractor mower driven by New Sweden's

employee. That tractor mower was under the exclusive control of that employee and the damage of the type which occurred would not, within common knowledge and experience of a layperson, have happened in the absence of negligence.

The Plaintiff attempted to establish the cause of the break in the well pipe by expert testimony, but he was not allowed to do that. In the case of *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 585, 548 P.2d 80 (1976), Idaho's Supreme Court acknowledged that the basis upon which the trier of fact determines whether the accident would not have ordinarily happened in the absence of negligence is that of common knowledge and experience. *Citing, Harper v. Hoffman,* 95 Idaho 933, 523 P.2d 536 (1974). However, in cases 'where common knowledge alone may not be sufficient to enable a layman to say the accident is of a kind which ordinarily does not occur in the absence of negligence,' expert testimony may be admissible. *Citing, Walker v. Distler,* 78 Idaho 38, 47, 296 P.2d 452, 458 (1956). In such cases, expert testimony may give a foundation for the trier of fact to reasonably conclude that the accident would not have ordinarily occurred in the absence of negligence. *Citing, Hale v. Heninger,* 87 Idaho 414, 393 P.2d 718 (1964).

The District Court erred in the application of the doctrine of *res ipsa loquitur*; but, in any event, if there was a question whether the break in the well pipe would not have happened in the absence of negligence, the District Court abused its discretion by not allowing the Plaintiff the opportunity to have presented expert testimony on this issue.

IV. ERROR IN FINDING COMPARATIVE NEGLIGENCE ON THE PART OF THE PLAINTIFF

The District Court's finding of comparative negligence on the part of the Plaintiff was based on its conclusion that Idaho Code § 42-1102 allowing encroachments within the right-of-way required the written permission of New Sweden and if there was no written permission, then those encroachments automatically "unreasonably and materially" interfered with the use of the right-of-way, creating negligence on the part of Bradley Morgan. It is again emphasized that the holding by Idaho's Supreme Court in the above-referenced cases makes it clear that this was not the proper interpretation of this statute that controlled New Sweden's exercise of its right-of-way and there was no factual basis established which showed that these encroachments in any way unreasonably or materially interfered with New Sweden's ***reasonable and necessary*** use of its easement or right-of-way, which is the test that should have been applied on this issue. In this case, it was clear that there was no reason for New Sweden having directed its employee to have driven this huge tractor mower on the property of the Plaintiff at the time when this damage was done. There was no cleaning, maintenance or repair of the canal that was needed at that location at that time. New Sweden failed completely to establish that the use of this type of heavy equipment at that place and at that time was either reasonable or necessary. If New Sweden had exercised reasonable care, it would never have been on the Plaintiff's property for any reason and if New Sweden's employee had not been on the property of Bradley Morgan on this huge tractor mower, no damage would have resulted.

V. ATTORNEYS FEES ON APPEAL

The Appellant seeks an award of costs and attorneys fees on appeal pursuant to I.C. § 12-121 on the basis that New Sweden has in this case pursued, defended, or brought frivolously,

unreasonably, or without foundation an action for declaratory judgment construing its right to an easement or right-of-way that has no basis in law or fact.

CONCLUSION

It is undisputed that New Sweden had, and has, a statutory easement as is reasonable and necessary to properly clean, maintain and/or repair its canal that runs along the westerly boundary of Bradley Morgan's land. It is undisputed that the encroachments in this case were placed on the property prior to any statutory requirement for written permission from New Sweden. It is also undisputed that for a period of 35+ years New Sweden permitted the property owners on both sides of the canal to clean, maintain and repair the canal themselves, without having to exercise that easement and at no cost or expense to New Sweden. It is also undisputed that for a period of 35+ years, it was not necessary for New Sweden to use a mower with a 16 foot wide span to mow along that section of the canal on either side, nor has New Sweden ever used an excavator to remove weeds within the canal at this location. The undisputed facts also established that on this one occasion, the employee of New Sweden used a huge tractor/mower to cut down or destroy plants, shrubbery and trees belonging to Bradley Morgan that did not have to be cut down in order to properly and necessarily clean, maintain or repair that section of the canal; that in so doing, it could also be reasonably inferred that employee impacted the stairway on the back of Bradley Morgan's barn, breaking a part of that structure and requiring its repair; that in so doing, it could reasonably be inferred that this employee impacted the well pipe and broke that pipe below the surface, requiring that it be repaired; that in so doing, it could reasonably be inferred that this employee drove on or over the sprinkler system, breaking off

several sprinkler heads; and, although the District Court never addressed this issue, the damages to Bradley Morgan were established with reasonable certainty.

If summary judgment is appropriate in this case, that judgment should declare (1) that the easement of New Sweden is not exclusive; (2) that an easement 16 feet wide is neither reasonable, nor necessary to New Sweden's use and enjoyment of its easement; (3) that the structures erected by Bradley Morgan and the plants, shrubbery and trees either growing naturally or planted by Bradley Morgan do not unreasonably nor materially interfere with New Sweden's use and enjoyment of its easement; (4) that as long as the property owners are properly cleaning and maintaining the canal without cost to New Sweden, there is no reason for New Sweden to exercise that easement; and, (5) New Sweden has negligently and carelessly caused monetary damage to the structures, plants, shrubbery and/or trees on Bradley Morgan's property and that such damage has been proven and the monetary value of those damages was undisputed.

Bradley Morgan should have prevailed on summary judgment on the issue of the scope and extent of New Sweden's easement; further, it was error given the scope and extent of the easement declared by the District Court not to have required that all property owners along the canal have been named as defendant's in New Sweden's counterclaim; and, Bradley Morgan should have prevailed in his claim for damages based on the inferred negligence of New Sweden's employee.

Bradley Morgan should be awarded his costs and attorneys fees on appeal.

DATED this 8th day of March, 2013.

M. BRENT MORGAN
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I, M. Brent Morgan, hereby certify that on this 8th day of March, 2013, a true and correct copy of the foregoing ***Appellant's Opening Brief on Appeal*** was served by placing a copy thereof in the U.S. Mail, postage prepaid, and addressed to the following:

Blake G. Hall
NELSON HALL PARRY TUCKER, P.A.
PO Box 51630
Idaho Falls, ID 83405-1630

M. BRENT MORGAN


NEW SWEDEN IRR. DIST.
PLAINTIFF'S
EXHIBIT
1